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No. 88-1400

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IN THE

# Supreme Court of the United States

October Term, 1988

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA;  
LEONARD WILSON, Individually and as District Manager,  
Chicago Office of the Franchise Tax Board of the State of  
California; and B.M. Rarang, Individually and as Auditor, Chicago  
Office of the Franchise Tax Board of the State of California,  
*Petitioners,*

vs.

ALCAN ALUMINIUM LIMITED,  
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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I.

**QUESTION PRESENTED**

I. Did the Seventh Circuit err in finding, as a matter of law, that the Petitioner's unitary tax on domestic-subsidary, foreign-parent combinations constitutes a tax burden upon Respondent's foreign activities and that Respondent has standing to bring this action which charges that the tax burden violates the Foreign Commerce Clause of the United States Constitution.

**RULE 28.1 STATEMENT**

Petitioner is a Canadian corporation and has no United States subsidiaries or related companies that are not wholly owned. Petitioner has no parent corporation.

## II.

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## **JURISDICTION**

The technical jurisdictional requirements in the petition appear to be adequately set forth except that Petitioner has introduced in its petition a question not appealed to the Seventh Circuit and, therefore, that issue is not justiciable here. Specifically, Petitioner now wishes to argue whether the underlying action in this case is barred by the Tax Injunction Act (28 U.S.C. Sec. 1341) or the principle of comity. That issue was not appealed to the Seventh Circuit; therefore, this Honorable Court does not have jurisdiction thereon.



### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional challenge in this case is under the Foreign Commerce and Due Process Clauses of the United States Constitution: "The Congress shall have the power to regulate commerce with foreign Nations and among the several states and with the Indian tribes." Article I §8, cl. 3; "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." 14th Amendment.

### STATEMENT OF THE CASE

The majority of the Petitioner's Statement of the Case accurately delineated the history of this lawsuit. However, Respondent disputes the appropriateness of the final paragraph of Petitioner's Statement which speaks to the Seventh Circuit's comments involving the application of the Tax Injunction Act. Though illustrative, those comments were largely gratuitous. As stated hereinabove, the Tax Injunction Act issue was never appealed or argued. Therefore, any comments on the Act by Seventh Circuit are strictly dictum and are not adjudicable here.

## REASONS PETITION SHOULD BE DENIED

### I. DENIAL OF THIS PETITION WOULD ALLOW THE MATTER TO PROCEED ON THE MERITS, PREVENTING FURTHER UNNECESSARY DELAY.

The use of the unitary method of taxation (Worldwide Method of Combined Apportionment "WCA") beyond the boundaries of the United States has been and continues to be a matter of considerable international controversy. This Court's decision in *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 77 L. Ed. 2d 545 (1983), left unresolved the issue as to whether WCA is constitutional as applied to unitary groups headed by foreign parents:

We have no need to address in this opinion the constitutionality of combined apportionment with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries.

77 L. Ed. 2d at 568 n.26.

Since *Container*, numerous foreign parents have sought to challenge the tax. See *EMI Ltd. v. Bennett*, 738 F.2d 994 (9th Cir. 1984) *cert. den.*, 469 U.S. 1073 (1984) and *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593 (9th Cir. 1983) *cert. den.*, 464 U.S. 1012 (1983). Including and until now, all have met with procedural obstacles. Alcan has persisted because of its view that procedural obstacles were not substantive, but rather a series of tactics designed to delay a decision on the merits.

*Alcan Aluminium Ltd. v. Franchise Tax Board*, 558 F. Supp. 624 (S.D.N.Y. 1983), *aff'd mem.*, 742 F.2d 1430 (2d Cir. 1983), *cert. den.*, 464 U.S. 737 (1984), was Alcan's first case before the Federal District Court for the Southern District of New York ("Alcan N.Y."). In

Alcan N.Y., the first issue addressed and ultimately disposed of was that of abstention. The case was dismissed and affirmed on the basis of the lack of standing. In *Alcan Aluminium Ltd. v. Department of Revenue of the State of Oregon*, 724 F.2d 1294 (7th Cir. 1984), the Seventh Circuit again delayed resolution only this time it relied on the doctrine of ripeness. In the instant action, the Seventh Circuit declined to apply the doctrine of standing to further delay resolution of the substantive constitutional issue in this case.

The use by the Courts of the doctrines of abstention, ripeness and standing has long been recognized as mechanisms of delay. Professor Neil K. Komesar, in his article *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. Chi. L. Rev. 366 (1984), refers to the work of Prof. Fritz Scharpf, who nearly twenty years earlier recognized the use of these doctrines as a response to these perceived limitations:

Scharpf identified three attributes of the judiciary that limit its competence especially in political question cases: limitations on access to information; the need for uniformity of decision; and the need to defer to the wider responsibility of the political branches. One may observe these attributes at work in the foreign relations cases, which Scharpf and others take as paradigmatic of the political question doctrine. . . . Given these limitations, the judiciary is forced to be concerned that it may be doing damage by exposing sensitive information, reducing necessary flexibility, or otherwise producing undesirable results.

Scharpf recognized that the Court could respond to these limitations in several ways other than abstention required by the political question

doctrine. For example, the Court might use such procedural or jurisdictional responses as "standing" or "ripeness" to delay its decision in an effort to clarify the issues or the facts.

*Id.* at 382.

As incredible as it may seem, Alcan started its effort to obtain a judicial resolution of this case in 1981. We are rapidly approaching the ten-year anniversary of the instigation of this litigation! If this Court were to accept this case on the issues presented by the Petitioner, and affirm the Seventh Circuit, it may well be another five years before the substantive issue in this case is finally resolved. We can see no legitimate reason, such as those outlined by Professor Scharpf, that would justify such a result.

## II. DENIAL OF THIS PETITION WOULD CAUSE LITTLE HARDSHIP TO THE PETITIONER.

The Petitioner's appeal to this Court is in the nature of an interlocutory appeal. In fact, had the District Court held that standing was appropriate as it had prior to the appointment of a new judge, the issue would not have been appealable (28 U.S.C. §1292). The policies underlying the prohibition of interlocutory appeal are equally applicable in this case. Moreover, the nature of the proceeding below would result in their being little hardship imposed on the Petitioner.

This case was originally assigned to Judge Prentice Marshall. The Franchise Tax Board of the State of California ("FTB") moved to dismiss based on standing and other theories. Their motion was denied. The parties then undertook to address the merits of the constitutional issue. They agreed that the case could be resolved on stipulated facts. Substantial stipulations were prepared and submitted by the parties. In the interim, this case was transferred from Judge Marshall to Judge Anne Williams who had recently been appointed to the bench.

The merits of the case were submitted to Judge Williams on cross motions for summary judgment. In addition, the FTB had renewed its motion to dismiss for lack of standing as a precautionary measure to insure that the issue was preserved for review by this Court. To everyone's surprise, Judge Williams did not address the merits and dismissed the case for lack of standing.



By denying this petition, this Court would not only achieve the objectives sought by the prohibition against interlocutory appeal, it would not subject the Petitioner to any hardship. The case would be returned to the District Court, which would then be confronted with fully briefed motions for summary judgment. The FTB would have to do nothing, but await the decision of the District Court which it could then appeal to the Seventh Circuit. In short, the only additional work that a denial of this petition would require would be one or two briefs at the Seventh Circuit, which would, in substance, be much like the briefs already filed at the District Court. Therefore, a denial of this petition would pose little hardship on the FTB.

**III. GRANTING THIS PETITION WOULD PRESENT A SUBSTANTIAL HARDSHIP TO ALCAN AND SEVERELY DISADVANTAGE NUMEROUS OTHER FOREIGN PARENTS WHO ARE LOOKING TO THIS CASE FOR A DETERMINATION OF THEIR RIGHTS.**

Respondent has spent nearly a decade attempting to obtain a resolution of a constitutional claim it raises. It has exhausted every reasonable effort to expedite the judicial process. It has avoided the discovery process, usually cited as the bane to efficient judicial administration.

The FTB on the other hand finds delay to its advantage. Delay raises the transaction costs. It gives the FTB an advantage in settlement negotiations with other unitary businesses headed by foreign parents which undoubtedly results in the FTB being able to obtain substantial revenues to which this Court may ultimately hold it was never entitled.

Finally, delay under these circumstances brings disrespect to the justice system.

#### IV. JUDICIAL ECONOMY REQUIRES THAT THIS PETITION BE DENIED.

Since Alcan first raised its constitutional challenge to WCA, it has recognized that the issue of standing and the issue of the merits are fundamentally related concepts. Put another way, if Alcan does not have standing to challenge WCA because its injury is not sufficiently direct, then there can be no foreign commerce challenge even if raised by the U.S. subsidiary. Alcan operates exclusively in foreign commerce. Its U.S. subsidiary does not operate in foreign commerce. If WCA results in impermissible foreign commerce burdens, those burdens must fall directly and exclusively on Alcan.

The Seventh Circuit, in holding that Alcan and ICI have standing, necessarily had to define for itself the nature of the foreign commerce burden. In its view, it is the fact that WCA has the potential to "penalize" the foreign ownership of American assets that gives rise to standing. Having qualitatively defined the injury, the Seventh Circuit left the determination of whether the quantity of injury rose to constitutional significance:

Evaluation of the constitutional significance of this threat must await the district court's assessment of the merits of this appeal. We decide only that the potential for constitutionally significant offense is sufficient to create standing.

*Alcan Aluminium Ltd. v. Franchise Tax Board*, 860 F.2d 688 (7th Cir. 1988); set forth at A16, n.10, Petition for Writ of Certiorari.

Although disclaiming any decision on the merits, the decision on standing necessarily surveyed the panoply of issues that are raised by the merits. In fact, Alcan's brief on the issue of standing and the brief it submitted at the district court on the merits were virtually the same. It makes little sense for this Court to review both the merits and standing separately. It is a far better use of this Court's time and resources to master the numerous stipulations in this case only once for the purpose of resolving both the standing issue and the merits.

**V. THE ISSUE OF STANDING AND THE ISSUE RAISED BY THE PETITIONER CONCERNING THE APPROPRIATE INTERPRETATION OF THE TAX INJUNCTION ACT DO NOT PRESENT SIGNIFICANT AND BROAD ISSUES OF POLICY THAT HAVE GENERAL APPLICATION.**

Perhaps the most compelling reason why this Court should deny this petition is that the issues that the Petitioner seeks to raise have little or no relevance beyond the specific facts of this case. This Court should limit the exercise of its jurisdiction to those issues which are both important and have widespread application. The issues in this petition fail both tests.

The issue of standing and the proper application of the Tax Injunction Act ("Act") presented by this petition have little application beyond the precise facts presented by WCA. In short, they have no application or relevance beyond their application in the WCA context.

For example, the issue involving the Act is almost no issue at all. Except for the aberrational view of one district court (see *EMI, infra*, at p. 4), the doctrine applied by the Seventh Circuit has been uniformly adopted by every district court and every circuit court that has reviewed the issue.

The issue of standing is also unique. Alcan's and ICI's claim to standing is predicated on the direct injury to its own activities in foreign commerce. The doctrine that standing is appropriate because "it burdens foreign companies' decisions to conduct business through subsidiaries operating in California, [and] it threatens to offend this country's trading partners ..." is not a doctrine that is finding wide-spread application. See Opinion, Petition for Writ of Certiorari, A10. Its application is extremely narrow and its importance is limited only to the issue of WCA. For that reason, this Court should not grant Petitioner's request and review these issues outside of their relevant context.

## CONCLUSION

The issue of the constitutional propriety of WCA is a matter of bitter international controversy. It is a matter which should have been resolved years ago. The fact that the Alcan case is only now approaching resolution after almost ten years in the judicial system is a strident commentary on our judicial process. The fact that the FTB has undoubtedly taken enormous financial advantage of the delay is an embarrassment to those of us who cherish a sense of fairness in our judicial system. Petitioner, by this petition, seeks to merely extend its manipulation of the system.

Alcan asks this Court to deny this petition not to deprive the FTB of its right to appeal, but rather to preserve for itself its right to its day in court. There is no compelling policy reason why the issues raised by the FTB need resolution at this time. Considerations of both economy and expediency militate against the piecemeal review that the FTB requests.

For the foregoing reasons, Alcan respectfully requests that this Court deny Petitioner's request that it issue a Writ of Certiorari in this case.

Respectfully submitted,

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